

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JAMES WOODS,

Petitioner,

08-CV-144(Sr)

v.

JOHN LEMPKE,

Defendant.

DECISION AND ORDER

By Decision and Order entered December 9, 2008, the Hon. Hugh B. Scott denied petitioner's petition for writ of *habeas corpus* and the Clerk of the Court entered judgment denying the petition. Dkt. #9.

Petitioner filed a Notice of Appeal on January 9, 2009. Dkt. #13.

Petitioner filed a motion for reconsideration on February 9, 2009. Dkt. #15.

Judge Scott recused himself by Text Order entered March 12, 2009 and the case was reassigned to the undersigned. Dkt. #21.

On July 27, 2009, the Court of Appeals issued the following Mandate:

Appellant, *pro se*, moves for a certificate of appealability or that proceedings in this court be stayed until the district court rules on his pending motion for reconsideration. Upon due consideration, it is hereby ORDERED that the motion is

DENIED and the appeal is DISMISSED because Appellant has not made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c); *Miller-El v. Cockrell*, 537 U.S. 322 (2003). A stay of appellate proceedings is not warranted as the district court presently lacks jurisdiction to grant Appellant’s motion for reconsideration. See *Toliver v. Count of Sullivan*, 957 F.2d 47, 49 (2d Cir. 1992).

Dkt. #25. In *Toliver v. County of Sullivan*, the Court of Appeals reiterated that “the docketing of a notice of appeal ousts the district court of jurisdiction except insofar as it is reserved to it explicitly by statute or rule.” 957 F.2d at 49 (internal citation omitted). As a result, the district court can only grant a rule 60(b) motion if the Court of Appeals consents to “remand of the case, thereby returning jurisdiction over the case to the district court.” *Id.*

As the Court of Appeals declined to stay petitioner’s appeal to permit consideration of the motion for consideration on the grounds that the district court lacked jurisdiction and declined to remand the case to the district court, the Court continues to lack jurisdiction over petitioner’s motion for jurisdiction. Accordingly, petitioner’s motion for reconsideration is dismissed.

SO ORDERED.

DATED: Buffalo, New York
September 17, 2009

s/ H. Kenneth Schroeder, Jr.
H. KENNETH SCHROEDER, JR.
United States Magistrate Judge